

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

AUSTIN KILLIAN
Claimant

PARCO LTD
Employer

APPEAL 21A-UI-06143-WG-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 1/10/21
Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the February 16, 2021, (reference 01) unemployment insurance decision that denied benefits based upon a finding that claimant engaged in fighting on the job resulting in discharge for misconduct. The parties were properly notified of the hearing. A telephone hearing was held on May 11, 2021. The claimant participated personally and called Marolyn Kelly, Chad Webber, Kyle Georgi, and Gina Morgan to testify on his behalf. The employer participated through Julie Diaz and introduced Exhibit 1 into the evidentiary record without objection.

ISSUE:

Whether claimant is disqualified from benefits as a result of being discharged for misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time from April 8, 2019, until this employment ended on December 20, 2020. Claimant was working as a crew-chief as of December 20, 2020.

On December 20, 2020, the employer held a mandatory staff meeting. Numerous individuals were present, including but not limited to Mr. Killian, Mr. Georgi, Mr. Webber, and Ms. Morgan, all of whom testified. The events surrounding that staff meeting resulted in the discharge of claimant.

Ms. Diaz is the human resources manager for the employer. She was not present at the mandatory meeting on December 20, 2020. However, she testified that she began receiving messages or notifications from staff members present at the meeting about an altercation or argument erupting during the meeting. Ms. Diaz specifically received a message at 8:27 indicating there was commotion at the restaurant. At 8:53 a.m., Ms. Diaz received a phone call from Jackie Behrens, a member of management who was leaving the restaurant to become a district manager. Ms. Behrens reported the occurrence of a verbal altercation between claimant and Kyle Georgi. Ms. Diaz instructed Ms. Behrens to send both participants home and to call police. The employer introduced evidence that the police were called and arrived at the scene.

Claimant concedes the police arrived and he permitted a search of his vehicle, revealing no weapon on December 20, 2020.

After conducting some interviews of individuals present at the meeting, including but not limited to an interview with the new general manager of the restaurant on December 20, 2020 at approximately 12:21 p.m., Ms. Diaz made the determination that there was a violation of the company's code of conduct and that discharge was appropriate given the severity of the allegations and number of individuals present and potentially involved or affected. Specifically, Ms. Diaz noted there was initially suggestion of a weapon being at work and comments that the claimant had threatened Mr. Georgi. Accordingly, Ms. Diaz authorized and directed discharge of Mr. Killian for misconduct. The employer challenged the claim for unemployment based on this discharge for misconduct.

Claimant testified that he did not say anything to Mr. Georgi at the staff meeting on the date of the alleged altercation. He testified that Mr. Georgi was "not right" when he reported to the meeting on December 20, 2020. However, claimant denied having a weapon, threatening, or making any verbal aggressive comments toward Mr. Georgi.

Mr. Georgi testified at the hearing. He acknowledged that he was admitted to the hospital after the incident and the hospital indicated that he had taken Adderall and had not slept. He concedes he was "not right" when he reported to the meeting on December 20, 2020. He denies claimant exhibited any aggressive behavior or comments toward him on the day of the meeting.

Claimant called his foster mother, Marolyn Kelly, who was also a foster mother for Mr. Georgi. Ms. Kelly testified that Mr. Georgi was "off" on the day of the meeting, that he had not slept, and had taken some incorrect medication. She confirmed that Mr. Georgi was admitted to the hospital on December 20, 2020, following the alleged incident. She also testified that Mr. Killian was confused about the events after they occurred, but no weapon was found by police on his person or in his vehicle on that date.

Claimant also called witnesses present at the meeting, who denied that there was a verbal or physical altercation between claimant and Mr. Georgi on December 20, 2020. Although the evidence establishes that members of management were present for the December 20, 2020 meeting and incident, as well as various other employees, none of these individuals were called to provide direct testimony as to the events. Ultimately, the information relayed to Ms. Diaz by witnesses is hearsay that was not subject to cross-examination at hearing. The testimony offered by Mr. Killian and his witnesses was based on personal observations and subject to questioning at hearing.

While some troubling events certainly must have transpired at the employer's place of business on December 20, 2020, which were significant enough to have employees message and alert human resources on a Sunday, the employer did not produce direct evidence of the alleged altercation or events that led to the claimant's discharge. Claimant's eyewitnesses carry greater weight than hearsay from individuals not testifying at hearing. Therefore, I find that the employer failed to establish that Mr. Killian was involved in a physical or verbal altercation with Mr. Georgi on December 20, 2020, sufficient to result in a finding of misconduct as defined by Iowa law.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

The decision in this case rests, at least in part, on the credibility of the witnesses. It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

In this case, the employer asserted it discharged claimant for fighting or verbally abusive conduct toward a co-employee, Kyle Georgi. However, the undersigned found that the employer failed to prove by a preponderance of the evidence that the conduct asserted actually occurred. This does not mean that the employer acted inappropriately. Only that the employer acted on information it received but is not able to or did not put forth witnesses to prove that the conduct actually occurred. Claimant denied the conduct alleged as misconduct occurred and called witnesses to confirm his version of events. The undersigned accepted the direct testimony of eyewitnesses over the hearsay testimony proffered by the employer. Ultimately, the undersigned found that the employer was unable to prove by a preponderance of the evidence that claimant engaged in misconduct sufficient to disqualify him from benefits. Accordingly, claimant is entitled to benefits if otherwise qualified.

DECISION:

The February 16, 2021, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.



William H. Grell
Administrative Law Judge

May 18, 2021
Decision Dated and Mailed

whg/ol